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United States Circuit Court of Appeals

For the Ninth Circuit

LEONARD CHENERY, as administrator with the will annexed of the estate of Edith P. Chenery, deceased,

Appellant,

vs.

THE EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LIMITED (a corporation),

Appellee.

OPENING BRIEF FOR APPELLANT.

WALLACE & AMES,
Mills Building, San Francisco,
Attorneys for Appellant.

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Statement of the Case.

This is a suit upon a policy of insurance providing indemnity for loss of life and injuries resulting from accidental means. The policy provides, among other things, that in the event of the death of the beneficiary, Edith P. Chenery, payment shall be made of two-thirds of the principal sum of seven thousand and five hundred dollars ($7,500.00), namely five thousand dollars ($5,000.00), to the legal representatives of the beneficiary. This action is brought by Leonard Chenery, as administrator with the will annexed of the Estate of Edith

P. Chenery, deceased, her legal representative to recover this amount.

The particular provision under which the liability of The Employers' Liability Assurance Corporation, Ltd., the defendant in error, is sought to be enforced, is found in Section II. of the policy which reads as follows (page 72, Transcript):

> "Section II.
>
> Beneficiary Benefits.
>
> If one person only is specifically named as the Beneficiary in the "Schedule of Warranties' hereinafter contained and such person is not under 18 or over 60 years of age, and is in sound condition mentally and physically; then, and not otherwise, this Policy shall also insure such Beneficiary against bodily injuries sustained during the term of this Policy, solely and independently of all other causes through external, violent and accidental means (suicide whether sane or insane is not covered), and received; while a passenger in or on a public conveyance (including the platform steps or running-board thereof) provided by a common carrier for passenger service (including Pullman cars); or while riding in a passenger elevator or escalator; or in consequence of the burning of a building while the Beneficiary is therein, as follows:
>
> For Loss of
>
> Life.....Two-thirds of Principal Sum."

It was proven at the trial of the case that this policy was in effect on the date of the death of Edith P. Chenery, premiums fully paid. It is not disputed that the formal provisions of the policy relating to the giving of notice to the Assurance

Corporation were complied with and liability denied by it.

Evidence was given, without contradiction on the part of the Assurance Corporation, that Edith P. Chenery died June 16, 1923. At the time of her death she was within the age limits prescribed and in sound condition mentally and physically. The cause of death was, solely and independently of all other causes, through external, violent and accidental means and not by suicide.

The Assurance Corporation denied, however, that she was

> "a passenger in or on a public conveyance (including the platform steps, or running board thereof) provided by a common carrier for passenger service * * *".

The proof relating to this fact was submitted upon the testimony of witnesses for the plaintiff in error, no testimony being offered by the Assurance Corporation.

It appeared without contradiction that on June 16, 1923, Mrs. Chenery was visiting at the home of her brother-in-law, George Humphreys-Davies, in New Zealand. Mr. Davies was the owner of a ranch about nine miles from the town of Clevedon. In going from this ranch to the railroad station which was at the town of Papakura, Mrs. Chenery and her party, consisting of Mrs. Hart (now Mrs. Graves, a witness at the trial), Mr. Spence and Miss Edge, took a farm cart to the road passing by

the ranch of E. Brown, a distance of about three miles, thence by a Ford automobile driven by J. Ward (whose regular business was the carrying of passengers, luggage and small merchandise) to Clevedon, a distance of about six miles; at Clevedon they changed to a Dodge motor-bus also operated by Ward; thence along the road to Papakura which was a distance of about eight miles from Clevedon.

Ward met the party at Brown's ranch by appointment made over the telephone by either Mrs. Davies or Mrs. Chenery. He took them over the above route past the town of Clevedon. At the town of Clevedon they changed at the suggestion of Ward, to his regular motor-bus, a Dodge car specially constructed for carrying passengers. He also carried at the same time a loaf of bread and a newspaper for delivery on the route as this was part of his business.

On the way from Clevedon to Papakura the Dodge motor-bus fell over an embankment and Mrs. Chenery was killed almost instantly.

The contention urged by the defendant was that Ward was on this occasion not acting in the capacity of common carrier and therefore there was no liability under the provision of the policy above quoted. Plaintiff in error maintained that he was a common carrier and that the defendant was liable under the express terms of its policy.

The trial judge ruled in favor of the defendant in error on its motion for a directed verdict (Transcript pages 57-64).

The principal question then before this Court is whether or not such ruling is correct.

The Court also ruled against plaintiff in error on questions of the admissibility of certain evidence bearing directly upon this issue, exception to which is taken (Assignment of Errors, Transcript pages 101-110).

I.

THE COURT ERRED IN GRANTING THE MOTION OF DEFENDANT IN ERROR FOR A DIRECTED VERDICT.

The evidence clearly shows that the deceased was at the time of her death a passenger in or on a public conveyance provided by a common carrier for passenger service.

The testimony of Hilda M. Graves, witness for the plaintiff in error, was as follows (Transcript pages 18 et seq.):

"My name was formerly Mrs. Hilda Hart. I was a visitor at the home of Mrs. Davies in New Zealand on June 16, 1923. Mrs. Chenery, Mrs. Spence, Miss Edge and myself left Mrs. Davies' home on that day to go to the railroad station at Papakura. We started in a horse drawn cart to a place somewhere along the road where we were met by Mr. Ward who was operating a Ford car.

It was Ward's regular business to carry passengers.

We were in the Ford half or three-quarters of an hour—possibly about six miles—and at Clevedon changed to a motor-bus.

That motor-bus had, as I recollect, four seats. There were three of us in the back seat. The main part of the car was filled with luggage. Mr. Spence and the driver, Mr. Ward, sat on the front seat. Mrs. Chenery, Miss Edge and myself sat on the rear seat.

It looked like a very large automobile to me, what we would call a motor-bus as distinguished from a pleasure car. The seats were very wide; they held three people; there was an extra seat in the middle. Its appearance was distinctly that of what we call a motor-bus as distinguished from a private car.

We drove, I suppose, half or three-quarters of a mile from Clevedon in this bus and it was dark, half past five, and raining and we slipped over an embankment and the motor-bus overturned and we went into a river. After that, I don't know just what happened for some time."

On cross-examination:

"Mrs. Davies telephoned for the driver to come. He came pursuant to that telephone message. We were transferred to a large machine at Clevedon. The driver, himself, requested the change to be made."

The testimony of Jessie L. P. Berry, witness for plaintiff in error was as follows (Transcript page 25 et seq.):

"I am a sister of Mrs. Davies and Mrs. Chenery. I have visited Mrs. Davies on several occasions. The last time I was there eight months and on a previous occasion six or seven months.

Mrs. Davies' ranch is about nine miles from Clevedon. The nearest railroad station is Papakura.

I know of my own knowledge the occupation of this Mr. Ward. He motored from Clevedon to Papakura taking passengers to and from trains and even to the ranch. It was his custom to get people from the ranches and take them to the trains. He has taken me from there.

I have never known him to refuse to serve anybody.

He usually stands in front of a little dry-goods store across the street from his home, I think it is; it is near the post office at Clevedon.

At Papakura he stands just as near to the train as he can get there. When the train arrives he solicits for passengers. I have seen him do that himself. He solicits passengers for Clevedon and along the road from Papakura to Clevedon; and he picks up passengers on the way.

He also solicits passengers at Papakura, at the railroad station, to the ranches in and around Clevedon.

I know he has taken me to the ranch; I cannot answer for anyone else. He is at the railroad junction soliciting anyone who comes at all trains.

There is an opposition line of motor-busses and there is competition between the two.

He solicits that trade going in the opposite direction, that is, to the railroad train from Clevedon out the ranch way. He operates that way as well. He has taken me from there several times. As nearly as I can remember I paid 30 shillings once from the ranch to Clevedon. I could not tell you whether that was his regular fare."

On cross-examination (page 29):

"I made a special bargain with him to get out. He does the same thing with other people. They make bargains with him. The railroad is at Papakura. There is no railroad at Clevedon. The Davies ranch is not on the road from Papakura to Clevedon, it is further on some nine miles beyond Clevedon."

On redirect (page 30):

"In answering counsel's question with reference to what he called a special contract, I don't mean to infer that this man does not carry everybody, he carries anyone who telephones him. I say, yes, he carries anyone.

I suppose you would call it a regular depot that he has at Clevedon. He has a stand there, a place where we go to get him; it is near the post office."

Deposition of John Massey Ward.

"My occupation is motor proprietor; that was my occupation in the month of June, 1923. I carried on my business under the name of Roberts & Ward. I have been engaged in that business five years.

I did not know Mrs. Edith P. Chenery prior to her death which occurred June 16, 1923. On that day I was in the business of operating a motor-bus or busses for hire to the public. I operated between Clevedon and Papakura. I used in carrying passengers from Clevedon to Papakura a Dodge passenger car lengthened to add seat in center for extra passengers. It carried nine passengers comfortably. I charged the regular rate of hire for passengers between these two towns, three shillings single fare, six shillings return. I made regular trips between these two towns. My route connected with the railroad at Papakura.

I was in the business of conveying between these two towns any passengers for hire who should apply to me for carriage between these two points. I served the public in general.

I carried upon my motor-bus in addition to passengers parcels or small merchandise.

My motor-bus travelled over the regular route between Clevedon and Papakura.

I know Mr. George Humphreys-Davies. He lives at Sandspit, nine miles from Clevedon. I have known him several years; also his wife who lives at the same place.

On June 16, 1923, I first saw Mrs. Edith P. Chenery at Whakatiri, six miles from Clevedon, where I went to pick her up. She requested me by telephone to call for her. I called for her at Whakatiri.

On the date mentioned Edith P. Chenery was a passenger in my motor-bus, but not on the regular Clevedon to Papakura run.

I took her from Whakatiri to the place of the accident. Mrs. Hart, Mr. Spence and a nurse whose name I cannot recall were with us. I carried them from Whakatiri to Clevedon in a Ford car and from Clevedon to the place of the accident in a Dodge car. We transferred to the Dodge car at Clevedon.

Nine passengers could ride in that motor-bus. As this was a special trip the charge would have been one pound fifteen shillings. From Whakatiri is a special fare, and a special fare rules after the usual run from Clevedon to Papakura. The ordinary fare from Whakatiri to Clevedon is fifteen shillings and from Clevedon to Papakura is three shillings.

On account of passengers' luggage there was not room for anyone else in the motor-bus.

Several bags and hampers were carried; I do not remember the exact amount.

On that occasion I had one loaf of bread and one newspaper to deliver along the route. They were not delivered.

I took the main road between Clevedon and Papakura. This was the regular route that I took for the purpose of carrying passengers to Papakura.

On June 16, 1923, while taking Mrs. Chenery and others to Papakura from Clevedon my car capsized, which resulted in the death of Mrs. Chenery.

At the time of this occurrence, Mrs. Edith P. Chenery was a passenger for hire in my motor-bus."

Cross-interrogatories (page 38):

"My regular run was between Clevedon and Papakura. I first met Mrs. Chenery at Whakitiri where I took her into my automobile for transportation to Papakura. This point was not on my regular run from Clevedon to Papakura. It was about six miles away. Clevedon to Papakura is west. The place where I first met Mrs. Chenery and took her into my car is East from Clevedon about six miles. It is about eight miles from Clevedon to Papakura.

I first met Mrs. Chenery and took her into my automobile for transportation to Papakura on the road we call the Maori Road, opposite direction from the Papakura Road. I have no regular run of automobiles on the Clevedon-Freshwater Road, unless they were specially hired for such purposes. I do not know a road called the Freshwater. Was on the Maori Road to pick up Mrs. Chenery and party. Mrs. Chenery asked me by telephone. Payment has never been made for the services. Mrs.

Chenery arranged for payment. She was one of a party of four that constituted her party for whom transportation was desired from the Humphreys-Davies farm to Papakura.

The time of my regular runs from Clevedon to Papakura is three trips daily; leaving Clevedon at 7:00 o'clock A. M., 8:30 o'clock A. M. and 3:30 o'clock P. M. That automobile had not left Clevedon for these regular runs that day. The accident occurred some hours later. The last automobile left on the regular run from Clevedon to Papakura at 3:30 o'clock P. M. The automobile in which Mrs. Chenery was riding left Clevedon for Papakura at about half past five in the afternoon.

Several bags and hampers were in the automobile, I do not remember the exact amount. There were no other persons in the automobile besides Mrs. Chenery and the party of which she was a member, and myself.

At the time of the accident I had no other business than motor proprietor. My partner had a garage business. I had several automobiles. I never employed outside drivers. All driving done by either my partner or myself. It is a fact that I hired out automobiles privately in addition to the automobiles used on the regular run from Clevedon to Papakura. A person could engage an automobile from me privately for transportation from Clevedon to Papakura. I had at my garage automobiles which anyone could hire privately.

The regular fare on the regular run from Clevedon to Papakura was three shillings. The amount usually charged for transporting Mrs. Chenery from the Humphreys-Davies farm to Papakura was one pound fifteen shillings.

My last regular schedule run was to leave Clevedon at 3:30 in the afternoon. That was the last regular run for that day. If the automobile involved in the accident had not been specially hired for the services I would not have sent any automobile from Clevedon to Papakura after 3:30 in the afternoon of that day.

Mrs. Chenery rang me on the phone and asked me if I would come and pick them up. These arrangements were made by Mrs. Chenery by telephone.

My partner was at the time of the accident carrying on a general garage business. He was doing general repair work of automobiles and selling parts and materials for automobiles.

My firm employed one boy.

My partner was also at that time agent for certain automobiles. These did all of the work of the garage, attended to the regular run from Clevedon to Papakura, and also looked out for private calls where automobiles were specially hired.

It was my practice at the time of the accident to hire out cars for private use with drivers. It was part of my regular business. It was pursuant to that branch of my business that arrangements were

made to take Mrs. Chenery and party from the Humphreys-Davies farm to Papakura.

I had regular runs to places other than from Clevedon to Papakura.

Mrs. Chenery asked me before the accident what time the next train left Papakura and I told her 20 minutes to seven. She then said we would have plenty of time to drive slowly, as she was terribly nervous and that she was afraid to get in a motor car, boat or cart."

Deposition of George Humphreys-Davies.

(Page 46):

"My occupation is sheep-farmer.

I am a brother-in-law of Mrs. Edith P. Chenery. She was a visitor at my house just prior to June 16, 1923. She left on that day to go toward Auckland. Miss Edge, Mrs. Hart and Mr. Spence went with her. She went on a farm cart belonging to me to meet Ward's taxi at E. Brown's, a distance of about three miles. She was a passenger for hire, not on the cart, but on Ward's taxi. The cart was operated by a farm servant and the taxi by J. Ward.

J. Ward lives in Clevedon. His business in the month of June, 1923, was motor proprietor, licensed by Papakura Town Board to carry passengers for payment. He operates motor-busses between Clevedon and Papakura. I have ridden with him probably thirty-five or forty times.

He has a Dodge, chassis specially lengthened to hold extra seat between ordinary front and back seats. Specially built for hire service.

The charge made by Ward for carrying passengers between Clevedon and Papakura is three shillings and sixpence single fare and six shillings return. The fares fluctuate according to competition. Ward has a regular route between Clevedon and Papakura for the carrying of passengers. He also carries bread for the Papakura bakery every morning except Sundays, parcels and small baggage, independent of passengers.

Ward serves the public generally in the carrying of passengers, packages and other articles."

Cross-examination (page 50):

"I did not call up J. Ward and arrange for transporting these persons from my farm to Papakura. My farm is a continuation of the road which runs from Clevedon to Papakura. It is not on the run made regularly by Ward from Clevedon to Papakura. Papakura is on the remote side of Clevedon from my farm. There is a regular run from Clevedon to Papakura. My farm is about nine miles from Clevedon. It is on the same road which runs from Clevedon to Papakura but a continuation.

Mrs. Chenery first met Ward and began riding in his automobile at E. Brown's house, six miles from Clevedon.

They took hand baggage with them."

Deposition of Ethel Humphreys-Davies.

(Page 52):

"I am a sister of Edith P. Chenery. She was a visitor at my house just prior to June 16, 1923. On June 16, 1923, she went to Clevedon, enroute to Auckland.

She and her party were conveyed in a farm cart driven by a Maori as far as the unmetallized road. Then met by a Ford driven by Mr. J. Ward. Mrs. Chenery was not a passenger for hire aboard the cart but was on the car operated by J. Ward.

J. Ward lives in Clevedon. His business was garage and taxi and motor-bus service. He operated a motor-bus between Clevedon and Papakura. I have ridden in the motor-bus operated by him over twenty times.

It was a Dodge with specially lengthened chasis.

His charge for carrying passengers between Clevedon and Papakura was three shillings and sixpence single fare and six shillings return. Ward has a regular route between Clevedon and Papakura for the carrying of passengers. He also carries small parcels, papers, bread and small baggage.

Ward serves the public generally in the carrying of passengers, packages and other articles."

Cross-examination (page 55):

"I called up J. Ward and arranged for transporting these persons from my farm to Papakura. My farm is not on the road which runs from Clevedon to Papakura. It is not on the run which is

made regularly by Ward from Clevedon to Papakura. Papakura is on the remote side from Auckland from Clevedon. My farm is on the remote side from Clevedon. There is no regular run from my farm to Papakura nearer than Clevedon. My farm is nine miles from Clevedon. It is on an entirely different road than the road which runs from Clevedon to Papakura.

Mrs. Chenery first met Ward and began riding in his automobile in front of E. Brown's house, about three miles from my house. That point is about six miles from the beginning of his regular run from Clevedone to Papakura."

II.

WHETHER OR NOT A CERTAIN PERSON OR CORPORATION IS A COMMON CARRIER IS A QUESTION OF FACT TO BE LEFT TO THE JURY UNDER APPROPRIATE INSTRUCTIONS.

The question is not one of law alone but a question of fact also as to whether deceased was a passenger for hire upon a public conveyance operated by a common carrier.

Hinchliffe v. Wenig Teaming Co., 274 Ill. 417; 113 N. E. 707;

Bare v. Amer. Fwding. Co., 242 Ill. 308; 89 N. E. 1021;

Groves v. Great Eastern Cas. Co., (Mo.) 246 S. W. 1002.

The trial judge without asking the assistance of the jury in this case upon facts which construed in

the light most favorable to the defendant show a conflict, made up his own mind that Ward, the driver of the motor-bus, was at the time of the accident a private and not a common carrier. In so doing he chose to utterly ignore the testimony of all of the witnesses that it was Ward's regular business to carry passengers. The fact that he was licensed to do so by the Town of Papakura is brushed aside. The undisputed circumstances that on this very trip he was also carrying small packages for delivery, also a part of his regular business as a common carrier, is held to be of no consequence. The fact that this accident was on his regular route for carrying persons and on his regular motor-bus specially built and used for this purpose seems to have had no weight. The testimony that he was not known by the witness to have ever refused to serve anyone is not even referred to.

Upon what then must this opinion be based? Apparently this motor-bus driver was changed in character from what was distinctly a common carrier to a private carrier by a telephone call.

The ruling of the trial Court,—without allowing the jury to pass on the question—comes down, in its last final analysis to just that and as authority for that point we are citing the decision of the U. S. Supreme Court in

Terminal Taxicab Co. v. Kutz, 241 U. S. 252; 60 L. Ed. 984.

That case was an action *in equity* to restrain the Public Utilities Commission of the District of Co-

lumbia from exercising jurisdiction over the plaintiff. There was no jury or dispute of facts involved. The Court points out that as to a portion of its business the Taxicab Company *"asserts the right* to refuse the service". Based on that fact, and that alone, the Supreme Court says:

> "Although I have not been able to free my mind from doubt, the Court is of the opinion that this part of the business is not to be regarded as a public utility."

Taking the case for what it really holds, namely that the Taxicab Company as such was subject to the jurisdiction of the Commission as a common carrier as to the major part of its business and not so as to that part of the business where the company expressly asserts the privilege of refusing to accept contracts of carriage,—the case still leaves open two questions of fact to be determined in any subsequent case, namely:

> *First*—Does the carrier assert the privilege of refusing to carry?
>
> *Second*—If he does, then under which portion of his business is the carrier acting at the time in question?

We submit that in the case at bar there is not the slightest evidence that Ward "asserted the right to refuse the service". On the contrary there is direct evidence that he was never known to have refused to serve anyone.

Assuming even that he might have done so part of the time is there not still the second question as to *when* he is so acting?

These are all questions *of fact* for the jury.

Belfast Rope Work Co. v. Bushell, 1918 K. B. 211.

The same is true as to the question of whether or not a person is a passenger for hire on board the conveyance.

Hill's Admx. v. N. A. Accident Ins. Co., (Mo.) 215 S. W. 428;

Reynolds v. St. Louis Transit Co., (Mo.) 88 S. W. 50.

To hold otherwise is to resolve every doubt in the evidence *against the plaintiff.*

III.

THE COURT ON A MOTION FOR A DIRECTED VERDICT MAY NOT WEIGH THE EVIDENCE

U. S. F. & G. v. Blake, 285 Fed. 449 (C. C. A., 9th Cir.):

"On a motion for a directed verdict, the Court may not weigh the evidence and if there is substantial evidence both for the plaintiff and defendant, it is for the jury to determine what facts are established even if their verdict be against the decided preponderance of the evidence." (Citing cases.)

Texas v. Brilliant Mfg. Co., 2 Fed. (2nd) 1 (Dec. 1924, C. C. A.):

"Where there is evidence of a substantial character bearing upon the issue, the question is for the jury even though the Court may think

there is a preponderance of evidence for the party moving for a direction, City & Suburban Railway v. Svedborg, 194 U. S. 201, and this is true even though the Court, if called upon to find the facts, would have decided in favor of the moving party."

Glaria v. Washington Southern R. Co., 30 App. D. C. 559; cited in *Terminal Taxicab Co. v. Blum,* 298 Fed. 679:

"A motion to direct a verdict is an admission of every fact in evidence and of every inference reasonably deducible therefrom. The motion can be granted only when but one reasonable view can be taken of the evidence and the conclusions therefrom and that view is utterly opposed to the plaintiff's right to recover in the case."

Mah See v. North American Accid. Insurance Co., 189 Cal. 415:

"This Court has frequently held that, even though all the facts are admitted or uncontradicted, nevertheless, if it appears that either one of two inferences may fairly and reasonably be deducted from those facts, there still remains in the case a question of fact to be determined by the jury (or by the trial judge where the case is tried without a jury) and that the verdict of the jury or finding of the trial judge cannot be set aside by this Court on the ground that it is not sustained by the evidence."

In disposing of a motion for a directed verdict, trial Court must accept evidence as most favorable to party against whom motion is made, and deny it

if reasonable men may honestly draw different conclusions.

Leehy v. Detroit M. & T. etc. Ry., 240 Fed. 82;

Meers & Dayton v. Childers, 228 Fed. 640, affirmed in 241 U. S. 663;

So. Ry. Co. v. Clark, 233 Fed. 900;

Caroline etc. Ry. v. Stroup, 239 Fed. 75.

IV.

THIS SITUATION COMES DIRECTLY WITHIN THE SCOPE OF THE POLICY.

We might be content with the above citation of authorities showing error on the part of the trial Court in granting a directed verdict were it not for the fact that there have been many cases similar or analogous to the case at bar where it has been held that the operator of a motor-bus or taxicab like the one herein described is a common carrier and the insurance company made liable.

First briefly referring to the accepted definitions of a common carrier:

McCoy v. Pacific Spruce Corporation, 1 Fed. (2nd) 853 (C. C. A., 9th Cir., Oct. 20, 1924).

> "A common carrier is generally defined as one who by virtue of his calling and as a regular business, undertakes to transport persons or commodities from place to place, offering his services to such as may choose to employ him and pay his charges."

See also:

Cushing v. White, 172 Pac. 229 (Wash.).

Into this category without question falls the motor-bus and taxicab.

That the proprietor of a line of omnibuses and baggage wagons engaged in carrying passengers and baggage for hire between depots, hotels, etc., is a common carrier, is held in

Parmelee v. Lowitz, 74 Ill. 116; 24 Am. Rep. 276;

Transfer Co. which also carried passengers is a common carrier,—

Carlton v. Donbar, 88 S. E. 174 (Va. 1916);

Held a person hauling for hire with an ox team within a town for everyone who applied to him as a common carrier,—

Robertson v. Kennedy, 2 Dana (Ky.) 430; 26 Am. Dec. 466;

That a company engaged in the moving of household goods is a common carrier,—

Lloyd v. Haugh, 223 Pa. 148; 72 Atl. 516; 21 L. R. A. (N. S.) 188;

That a common carrier may not by words of its contract convert itself into a private carrier, where the transportation undertaken and the duties and responsibilities incident thereto are such as are ordinarily incident to a common carrier,

Vandalia R. Co. v. Stevens, (Ind. App.) 114 N. E. 1001.

That a jitney bus is a common carrier, see:

Schoenfeld v. City of Seattle, 265 Fed. 726 (Dist. Ct. Wash. N. D.);

Nolen v. Reichman, 225 Fed. 812;

Lane v. Whitaker, 275 Fed. 476;

Packard v. Banton, 44 Sup. Ct. 257;

Ivancich v. Davies, 186 Cal. 520.

A case interpreting a clause in an insurance policy almost exactly similar to the one in ours is:

Primrose v. Casualty Co. of America, 232 Pa. 210; 81 Atl. 212; 37 L. R. A. (N. S.) 618.

The Court holds that a taxicab hired by deceased and several friends is a "public conveyance", and the company is liable.

> "The contention of the learned counsel for the appellant is that the double indemnity clause is applicable only to the case of a person occupying a place for which he pays a fare in a railway car or conveyance operated for the common use of himself and of such promiscuous persons as may happen to take passage en route, over which conveyance he exercises no control. It is to be noted that the clause was inserted by the insurer itself in the policy of insurance which it issued to the insured, and, if it intended that the same should have the restricted meaning for which its counsel now contend, it could have readily so worded the clause. The insurance company could have so framed it that there would now be no doubt that the appellee could not insist that it was intended to extend to her claim. It is next to be remembered that, as the words used in the clause are the language of the insurer, a salutary rule of construction requires them to be construed most favorably to the insured

(*Hughes v. Central Acci. Ins. Co.*, 222 Pa. 462, 71 Atl. 923; May, Ins. 175); and, for the same reason, if the clause is capable of two interpretations equally reasonable, that is to be adopted which is most favorable to the insured. *Bole v. New Hampshire F. Ins. Co.*, 159 Pa. 53, 28 Atl. 205; *McKeesport Mach. Co. v. Ben Franklin Ins. Co.*, 173 Pa. 53, 34 Atl. 16. 'If the language of the policy is doubtful or obscure, it will be construed most unfavorably to the insurer. *Merrick v. Germania F. Ins. Co.*, 54 Pa. 277 A contract of insurance must have a reasonable interpretation, such as was probably in the contemplation of the parties when it was made; and when the words of a policy are, without violence, susceptible of two interpretations, that which will sustain a claim to the indemnity it was the object of the assured to obtain should be preferred. *Humphreys v. National Ben. Asso.*, 139 Pa. 214, 11 L. R. A. 564, 20 Atl. 1047.' *Frick v. United Firemen's Ins. Co.*, 218 Pa. 409, 67 Atl. 743. As applied to the admitted facts in the present case, we regard the double indemnity clause as having but one meaning.

The Pennsylvania Taximeter Cab Company was engaged in the business of hiring automobiles to the public,—'to the public generally,' is the language of the witnesses describing its business. 'Anybody at all' who was financially responsible could hire one. The secretary and treasurer of the company testified: 'They would be hired to anyone for rides, or for other personal transportation as passengers, from wherever they might get them to wherever they might want to go.' The machines, however, were never turned over to the control and management of those who hired them, but were always operated by a chauffeur or driver in the employ of the company. All that those who rode in them did was to direct where they were

to go. They were as much passengers in them as they would have been if riding in a specially chartered car of a railroad company, from which all but themselves were excluded; the only difference being that, as automobiles do not run on rails, the occupants could select their own traveling route; and *it is not to be pretended that the double indemnity clause does not include passengers riding on a specially chartered railroad car.*

The words, 'public conveyance provided for passenger service and propelled by gasoline,' are to receive a reasonable meaning. All conveyances are either for public or private use. The automobile in the case at bar was not one for merely private use. It belonged to a company which, as already stated, was engaged in the business of hiring automobiles for general public use. The use of no one of its machines was limited to any particular person, but anyone able to pay the price for the privilege of riding in it, while it was under the control of and being operated by one of the company's employees, could do so. In some cases a fare per head was charged for the use of the machine for a stipulated time, or for a specified journey; in other instances, there was a charge for the use of the car of so much by the hour, and, under this arrangement, the deceased and his friends hired the car in which they were riding."

Fidelity & Cas. Co. v. Joiner, 178 S. W. 806 (Tex. 1915),

is another case with almost precisely similar facts. The clause in the policy interpreted is:

"The amounts specified in the preceding articles shall be doubled if the bodily injury is sustained by the assured * * * (2) while in or on a public conveyance (including the

platform, steps, or running board thereof) provided by a common carrier for passenger service."

The insured was traveling in an automobile furnished by a liveryman for the purpose of going to several towns to call on customers.

The Court says:

"The automobile in which the assured was riding at the time the accident occurred belonged to the witness U. G. White, who operated a hotel and livery business in Whitesboro. White testified that in his business as a liveryman he owned and used horses, hacks, buggies, and two automobiles, which he hired to any one who applied to him for same and was willing to pay according to a schedule of charges he had established. He used the automobiles in his business like he did the buggies, except that he never hired them out without a driver, but always himself furnished drivers for them. His testimony, we think, was sufficient to support the finding of the jury that the automobile in which the assured was riding was a 'public conveyance provided for passenger service.' *Primrose v. Casualty Co.*, 232 Pa. 210, 81 Atl. 212, 37 L. R. A. (N. S.) 618; *Ripley v. Assurance Co.*, 16 Wall. 336, 21 L. Ed. 469.

In the case of:

Anderson v. Yellow Cab Co., 191 N. W. 748 (Wis. 1923)

the question came up in a personal injury suit as to the correctness of an instruction to the jury to the effect that a taxicab was a common carrier. The court distinguishes the case of *Terminal Taxicab Company v. Kutz,* then goes on to say:

"In order to constitute a public conveyance a common carrier, it is not necessary that it come within the definition of a public utility so as to be subjected to the rules and regulations of a public utility commission. *Newcomb v. Yellow Cab Co., Public Utility Reports* 1916B, page 985. To constitute the conveyance a common carrier it is not necessary that it should move between fixed termini, or even upon fixed routes. *Parmelee v. Lowitz,* 74 *Ill.* 116, 24 *Am. Rep.* 276; *Pennewill v. Cullen,* 5 Har. (Del.) 238. It has also been held that fixed charges are not an essential attribute of a common carrier of goods. *Jackson Architectural Iron Co. v. Hurlbut,* 158 *N. Y.* 34, 52 *N. E.* 665, 70 *Am. St. Rep* 432. Under the trend of modern judicial decisions it appears that the great weight of authority is in favor of holding a taxicab like that in the instant case as a public carrier. *Anderson v. Fidelity & Casualty Co.,* 228 N. Y 475, 127 N. E., 584, 9 A. L. R. 1549; *Cushing v. White,* 101 Wash. 172, 172 Pac. 229, L. R. A. 1918 F, 463;*Carlton v. Boudar,* 118 Va. 521, 88 S. E. 174, 4 A. L. R. 1480; *Georgia L. Ins Co. v. Easter,* 189 Ala. 472, 66 South. 514, L. R. A. 1915C, 456; *Casualty Co. v. Joiner,* (Tex. Civ. App.) 178 S. W. 806; *Lemon v. Chanslor,* 68 Mo. 341, 30 Am. Rep. 799; *Lewark v. Parkinson,* 73 Kan. 553, 85 Pac. 601, 5 L. R. A. (N. S.) 1069; *Jackson Architectural Iron Works v. Hurlbut,* 158 N. Y. 34, 52 N. E. 665, 70 Am. St. Rep. 432. *Parmalee v. Lowitz,* 74 Ill. 116, 24 Am. Rep. 276; *Donnelly v. Phila. & R. R. Co.,* 53 Pa. Super. Ct. 78, 82; *Van Hoeffen v. Taxicab Co.,* 179 Mo. App. 591, 599, 600m 162, S. W. 694; *Primrose v. Casualty Co.,* 232 Pa. 210, 81 Atl. 212, 37 L. R. A. (N. S.) 618, 622, 623; *Huddy on Automobiles* (6th Ed.) p. 152,-131; 2 *Moore on Carriers,* 944."

Anderson v. Fidelity & Casualty Co., 228 N. Y. 475; 127 N. E. 584.

This is another case exactly similar to ours in that it is a suit against an insurance company to enforce the double indemnity clause where the injury occurred to the insured while on a public conveyance operated by a common carrier. The Court holds that a taxicab is a common carrier. Among other things the Court says:

> 'Does not the term 'common carrier' have a different significance than the narrow definition given by Moore, to the layman who negotiates an insurance contract, by which he is to be paid a special sum provided his injury takes place while traveling in a public conveyance provided by a common carrier? The insurance contract certainly meant something, and its meaning was not limited by the old definition of 'common carrier'. Its indemnity was for personal injuries. Did not 'common carrier' include in the mind of the insured and in the mind of the ordinary man, a street car, busses, jitneys, taxicabs, and all means of conveyance which are publicly offered to travelers whether accompanied by their luggage or not, regardless of whether the offer is made by a carrier of goods and persons or merely of persons?
>
> The certificate of incorporation of the company owning the taxicab in question states that it is organized for the transportation of passengers or goods. Why, then, is it not a 'common carrier' within the meaning of the insurance policy in the instant case? That the company itself was a common carrier within the meaning of the policy, there can be, I think, little doubt.
>
> The tendency of the law is to eliminate distinctions which no longer continue in the mind

of the ordinary man. The Supreme Court of the United States well says in *Little v. Hackett,* 116 U. S. 366, 379, 6 Sup. Ct. 391, 397 (29 L. Ed. 652), Field, J.:

> 'There is no distinction in principle whether the passengers be on a public conveyance like a railroad train or an omnibus, or be on a hack hired from a public stand in the street for a drive.' "

Dunn. v. New Amsterdam Casualty Co., 126 N. Y. S. 229;

Action upon an insurance policy for injuries sustained while assured was—

> "actually riding as a passenger in a place regularly provided for the transportation of passengers, within a surface or elevated railroad car, steamboat or other public conveyance provided by a common carrier for passenger service only."

This was a suit arising out of the "General Slocum" disaster. This vessel was chartered by a Church Society for a picnic for a lump sum. Held:

> "The steamboat company is a common carrier. True this steamboat was specially chartered by an excursion party; but it was regularly provided for the transportation of passengers. It was not a freight boat and it was regularly in the business of taking similar parties to either of the two specified pleasure resorts."

Berliner v. Travelers Insurance Co., 212 Cal. 458;

Action upon a policy insuring the husband of the plaintiff against death by accident. The policy pro-

vided that if the injuries resulting in death were received while riding as a passenger in any passenger conveyance using steam cable or electricity as a motive power the amount to be paid would be double the amount set forth in the policy. At the time of receiving the injuries, decedent was riding temporarily upon the locomotive of a train, which was wrecked. Defendant sought to evade liability upon the ground that the contract of insurance did not provide for the death of the party by an accident while riding on the locomotive, but only in a conveyance intended for passengers.

In answering this argument the Court says:

> "The policy here in question, though a preferred class, was not special, covering only accidents to the insured while engaged in a designated employment, pursuit, occupation, or situation, but covered any possible accident which might happen to any one under any or all circumstances, provided it did not fall within an exception expressed in the policy.
>
> The term 'conveyance" applies as well to the means of transporting freight as of passengers, and in the clause exempting the insurance company from liability for accidents occurring in 'entering or trying to enter or leave a moving conveyance using steam as a motive power' is so applied; while the clause hereunder consideration distinguishes a 'conveyance provided for the transportation of passengers' from those used for the transportation of freight. Neither clause specified railroad trains, and each includes as clearly vessels propelled by steam. If the insured had met with an accident upon a passenger steamer instead of a railroad train, upon what part of the vessel must he have been

> at the time of the accident to be within the protection of his policy? Must he be seated in the cabin, or occupy a stateroom? The policy does not say so. It restricts him to no part of the vessel, and therefore if the insurance company sought to escape liability by showing that at the time of the accident he was not in the cabin or a stateroom, it must import into the contract a qualification or provision which is not expressed or even implied."

The Court also holds that policies of insurance are to be liberally construed in favor of the insured, and where its terms permit of more than one construction that will be adopted which supports its validity.

> "That the locomotive is part of the 'conveyance' provided for the transportation of passengers upon a railroad is not disputed. * * * If it had been intended to restrict the insured to any particular part of the conveyance, apt words to express such intention could have been readily found and used."

The Court quotes the following from *Equitable etc. Ins. Co. v. Osborn*, 90 Ala. 201:

> "Exceptions of this kind are construed most strongly against the insurer, and liberally in favor of the insured. This is now the settled rule for construing all kinds of insurance policies, rendered necessary, especially in modern times, to circumvent the ingenuity of insurance companies in so framing contracts of this kind as to make the exceptions unfairly devour the whole policy."

So in the case at bar when must the deceased have got on board the motor-bus in order to hold the in-

surance company on its policy for which it has been fully paid? If she got on at 3:30 o'clock in the afternoon Ward was a common carrier, but at 3:31 o'clock he was not according to its argument. Just as in the Berliner case it was absurd to say that the company is liable if the deceased boarded one part of the train and not liable if on another part of it, so here it is equally ridiculous to say that the company is not liable when the carrier is summoned by telephone though they are liable if summoned by voice at the railroad station.

Is this not an instance of "the ingenuity of Insurance Companies in so framing contracts of this kind as to make the exceptions unfairly devour the whole policy"?

V.

THE RULINGS OF THE TRIAL COURT UPON QUESTIONS OF EVIDENCE EXCEPTED TO WERE ERRONEOUS.

The assignments of error as to the rulings of the trial court are all relative to the one question of fact as to whether or not Ward was a common carrier. Such evidence on the part of the plaintiff was offered with reference to the general understanding of the witnesses gained from personal conversation with Ward and common repute.

We submit that such testimony while it may be hearsay to some extent yet that is the only possible way to prove such a fact. All knowledge of that sort is necessarily the result of contact with others.

The objections made by plaintiff to questions on cross-examination by defendant were for the sole purpose of excluding extraneous facts as to other matters. Certain of the questions to the witness Ward were obviously calling for a conslusion of law and should have been ruled out.

We respectfully ask, therefore, that the order of the trial Court directing a verdict for the defendant be reversed and a new trial granted.

Dated, San Francisco,
March 9, 1925.

Respectfully submitted,

WALLACE & AMES,
Attorneys for Appellant.